(4) (1)

Single Bench

**IN THE HIGH COURT OF JUDICATURE AT BILASPUR**

**Cr. Appeal No.** 43 **/2006.**

**APPELLANT :** Kanhaiya,
**(IN JAIL)** S/O- Phool Singh Yadav,
Aged about 19 years,
R/O- Village Pandar, P.S. Patan
Distt.- Durg (CG)

Filed on 16/1/06
by Shri Bhaskar Payarly Advocate
16/1/06
R to D.R. (J)

**VERSUS**

**RESPONDENT :** The State of Chhattisgarh through P.S. Patan, Durg.

**CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROSEDURE'1973.**

(24)

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.43/2006

Kanhaiya

-Versus-

State of Chhattisgarh

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R.

(24)

**HIGH COURT OF CHHATTISGARH AT BILASPUR**

**Cr. Appeal No.43/2006**

Kanhaiya

-Versus-

State of Chhattisgarh

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**Present:-**
Appellant by Shri D.K. Gwalere, Advocate.
State by Shri Ashish Shukla, Govt. Advocate/Additional Public Prosecutor.

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**ORAL JUDGMENT**
(Delivered on 17/02/2006)

1. This appeal is directed against the judgment dated 25.10.2005 delivered by Shri A.K. Gaekwad, 4th Addl. Sessions Judge in special Case No. 146/2004 whereby the appellant Kanhaiya was convicted U/S 376 I.P.C. and was sentenced to undergo rigorous imprisonment for 7 years and a fine of Rs. 100/- and in default of payment to undergo rigorous imprisonment for 7 days.

2. It is not disputed that the prosecutrix P.W. 1 is the daughter of Hemlal P.W. 6 and Sukhbai P.W. 13.

3. Briefly stated the prosecution story is that on 22.4.2004, the prosecutrix had gone to attend wedding of her friend Asha in village Sonpuri. After the wedding ceremony, while she was returning home with Gomti P.W. 4, near the river, they met the appellant and 3 other co-accused namely Yeman Kumbhkar, Ramesh @ Rameshwar and Narendra Kumar. The appellant forcibly took the

prosecutrix towards the river and committed rape on her while the above mentioned co-accused stood guard. After being raped, the prosecutrix returned to the village with Gomti P.W. 4. She informed about the occurrence to her mother Sukhbai P.W. 13 and brother Chandra Shekhar P.W. 5 aged about 19 years. However, First Information Report was lodged after considerable delay on 29.4.2004 mentioning that since father of the prosecutrix had gone out of the village, the delay had occurred in lodging the F.I.R.

4. The prosecutrix was sent for medical examination. Dr. Smt. S. Sawant P.W. 14 examined the prosecutrix and found that she was a fully developed lady with all 32 teeth erupted. During internal examination of the prosecutrix, Dr. Smt S. Sawant P.W. 14 did not find any mark of injury on any part of the body. Two fingers could be easily admitted in the vagina. On the basis of the above findings, vide Ex.P-15, no definite opinion about the commission of rape on the prosecutrix could be given by Dr. Smt. S. Sawant P.W. 14. The appellant Kanhaiya was also examined by Dr. S.K. Agarwak P.W. 15 and found that the appellant was capable of performing sexual intercourse.

5. Ossification test for determining the age of the prosecutrix was conducted by Dr. A.K. Sahu P.W. 8 who opined vide Ex.P- 9 that the age of the prosecutrix was about 15 years. The School Admission Register Ex.P-11 was seized from teacher Janaklal P.W. 9 wherein the date of birth of the prosecutrix was entered to be 6.8.1988.

6 After completion of investigation, the appellant along with 3 other co-accused mentioned above was prosecuted under Section 376 (2) (g) of I.P.C. The appellant abjured the guilt. The prosecution examined as many as 16 witnesses. The trial Court in para 14 of the judgment observed that the defence of the accused/appellant that he had committed sexual intercourse with the consent of the prosecutrix was plausible in view of the evidence led by the prosecution. It relied on ossification test report vide Ex.P-9 and the date of birth recorded in the School Admission Register vide Ex.P-11 (C) to conclude that the age of the prosecutrix on the date of the occurrence was less than 16 years. On these grounds, the trial Judge convicted and sentenced the appellant as aforesaid in para 1 while acquitting the other 3 co-accused.

7. Shri D.K. Gwalere, learned counsel for the appellant made a two-fold submission. Firstly, he argued that the evidence led by the prosecution clearly showed that under a pre-arranged plan, the prosecutrix had gone to meet the appellant near the river along with Gomti P.W. 4 and that sexual intercourse by the appellant, if any, was committed with the consent of the prosecutrix. Secondly, learned counsel for the appellant contended that considering the legally permissible margin of error under law even on the basis of the Ossification report vide Ex.P-9, it could not be ruled out that the age of the prosecutrix on the date of the occurrence was more than 16 years. He further contended that the evidence of Hemlal P.W. 6, the father of the

prosecutrix relating to the birth of the prosecutrix in para 6 was as vague as it could be. It was also argued that the evidence of Janaklal P.W. 9 in para 2 of the cross-examination clearly revealed no basis for entering the date of the birth of the prosecutrix to be 6.8.1988 in the School Admission Register which could not be said to be primary evidence of proof of birth. On these grounds, learned counsel contended that the evidence led by the prosecution could not form the basis for convicting the accused under Section 376 of the I.P.C. On the other hand, Shri Ashish Shukla, learned Government Advocate argued in support of the impugned judgment.

8. Having heard the rival contentions, I have perused the record. In appears that Gomti P.W. 4 had an important role to play in the incident. The prosecutrix has in para 13 of her testimony, clearly admitted that Gomti had arranged for her meeting with the appellant, pursuant to which she had gone with Gomti P.W. 4 towards the river. She also admitted in para 14 that this plan was pre-arranged. In para 13 of her cross-examination, the prosecutrix again admitted the fact that in the marriage house she and the appellant had already planned to meet, therefore, she did not disclose this fact to Gomti Bai. She also admitted in para 4 that at the time when the accused committed sexual intercourse with her, Gomti P.W. 4 was standing with the co-accused on the road. Gomti P.W.4 testified that while she stood with other co-accused the prosecutrix left with the accused towards the river and on returning after 15 minutes the

prosecutrix did not tell her anything. In para 8 she admitted that the prosecutrix had insisted upon her to arrange a meeting with the accused and on meeting Kanhaiya on way she quietly left with the appellant. Hemlal, P.W. 6, the father of the prosecutrix in para 11 as well as Sukhbai P.W. 13, the mother of the prosecutrix in para 4 of the cross-examination have not denied that the prosecutrix was in love with the appellant. The testimony of Dr. Smt. S. Sawant P.W. 14 also shows that there were no external injuries either on the person or on the private parts of the prosecutrix. Thus, the evidence led by the prosecution does not rule out the possibility that the appellant had committed sexual intercourse with the prosecutrix on 22.4.2004 with her consent.

9. The delay in lodging the F.I.R. has also not been explained satisfactorily. The prosecutrix has in para 5 of her testimony stated that she had narrated the incident to her mother on the night of occurrence and since her father did not return home for about a week, the report could not be lodged earlier. However, Hemlal Sahu P.W.6 has in para 1 of his testimony stated that he had returned home 2-3 days after the date of occurrence. The incident was dated 22.4.2004 and the F.I.R. was lodged on 29.4.2004 whereas the police station Patan was situated only 4 kilometers away from village Sonpur. Thus there is no satisfactory explanation for the delay in lodging the F.I.R. in this case. The prosecutrix in para 15 has also admitted that the first

information report was dictated by her father and she had only signed the report.

10. The only point which requires consideration now is the age of the prosecutrix on the date of occurrence. Dr. Smt S. Sawant P.W. 14 has stated that on examination of the prosecutrix, she found that all 32 teeth had erupted and the prosecutrix was a fully developed lady. Learned counsel for the appellant has placed reliance on page 49 of the Medical Jurisprudence and Toxicology by Modi 22nd edition to argue that the third molars or wisdom teeth erupt in the 17th to 25th years of age. This shows that the prosecutrix was at least 17 years of age on the date of occurrence. The observation of Modi is of definite significance in this case. The Ossification test conducted by Dr. A.K. Sahu P. W. 8 also shows that the estimated age of the prosecutrix was opined to be about 15 years. It is settled law that a legally permissible margin of error of 2 years on either side has to be given in the estimation of age given in the report of Ossification test.

11. Coming to the evidence of teacher Janaklal P.W. 9 to prove the entry in the School Admission Register vide Ex.P- 11 (C) showing date of birth of the prosecutrix as 6.8.1988, his testimony in cross-examination para 2 assumes importance. Janaklal P.W. 9 has stated that he was unable to state the basis on which the date of birth of the prosecutrix was entered in the School Admission Register as 6.8.1988. Reverting to the testimony of Hemlal P.W. 6 in para 6, he has admitted that Chandra Shekhar P.W. 5 his

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eldest son was born on 15.8.85 meaning thereby that Chandra Shekhar P.W. 5 was about 18 years and 8 months on the date of occurrence. His evidence as to the year of birth of the prosecutrix is contradictory since at one place he said that he did not remember the age of the birth of the prosecutrix and there could be a difference of a year or two in the date of birth narrated by him. Sukhbai P.W. 13 deposed that the prosecutrix was 4 years younger to Chandra Shekhar whereas Hemlal P.W. 6 stated the difference to be about 3 years. The testimony of Hemlal P.W. 6 and Sukhbai P.W. 13 is vague. The prosecutrix has in para 8 of her evidence sharply contradicted the above testimony by stating that her brother Chandrasekhar was aged about 19 - 20 years and she was one and half years younger to him. The Register of birth maintained by the Kotwar in the village has not been proved by the prosecution in this case.

12. In view of the finding recorded by Dr. Smt. S. Sawant P.W. 14, the legally permissible margin of error in the report of Ossification vide Ex. P-9, the contradictory evidence of Hamlal P.W. 6 Sukhbai P.W. 13 and the prosecutrix and the observation by Modi in Medical Jurisprudence and Toxicology it cannot be ruled out that on the date of occurrence, the prosecutrix was aged about 17 years or more.

13. Having considered the evidence led by the prosecution in its entirety, I am of the considered opinion

be ruled out that on the date of occurrence, the prosecutrix was aged about 17 years or more.

13. Having considered the evidence led by the prosecution in its entirety, I am of the considered opinion that evidence led by the prosecution does not rule out the possibility that sexual intercourse, if any, committed by the appellant was with the consent of the prosecutrix that the age of the prosecutrix on the date of occurrence was 17 years or more. In such a situation, conviction of the appellant under Section 376 and the sentence awarded thereunder deserves to be set aside.

14. In the result, the appeal is allowed. Conviction of the appellant under Section 376 I.P.C. and the sentence awarded thereunder are set aside. The appellant is acquitted. The appellant shall be set at liberty, if not required in any other case. Fine, if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Priya